88-409

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

No. . . . . .

WILLIAM B. RICHARDSON,
Petitioner

v.

THE PEOPLE'S NATURAL GAS CO., et AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS

For the Third Circuit

No. 87 - 3697

WILLIAM B. RICHARDSON, *pro se*
149 Westmoreland Avenue
Greensburg, PA 15601

The Palace Printer, Greensburg, PA 15601

24

QUESTIONS PRESENTED FOR REVIEW

1. Is it an abuse of discretion for the District Court to enter impromptu Dismissal with Prejudice during a settlement conference without prior notice to the pro se litigant of hearing with issuance of findings in clarification of such a hearing?

2. Is Dismissal with Prejudice the ultimate sanction for a litigant and not to be imposed without consideration of likely effectiveness of less stringent measures?

LIST OF PARTIES TO THE PROCEEDING

Plaintiff: (appearing pro se - not an attorney) William B. Richardson, 149 Westmoreland Avenue, Greensburg, Pa 15601

Defendants: PEOPLES NATURAL GAS COMPANY, a public utility operating in Western Pennsylvania and a subsidiary of Consolidated Gas Company, an interstate operator.

GERALD A. WILSON, Customer Service Foreman for Peoples.

The above represented by Jeffrey G. Brooks, Esquire, 42nd Floor U. S. Steel Building, 600 grant Street, Pittsburgh, Pa. 15219.

Defendants: PENNSYLVANIA PUBLIC UTILITY COMMISSION, Harrisburg, Pa.

JAMES D. PORTERFIELD, Administrative Law Judge
JOSEPH FARRELL, Director of Consumer Services
SARA J. COHICK, Consumer Service Representative

The above Commission and employees represented by Gloria Tischuk, Esquire, Deputy Attorney General, 4th Floor, Manor Bldg., Pittsburgh, Pa. 15219.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1
LIST OF PARTIES TO THE PROCEEDING 1
OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS 3
CONCISE STATEMENT OF JURISDICTIONAL GROUNDS 3
CONSTITUTIONAL PROVISIONS AND STATUTES 6
CONCISE STATEMENT OF THE CASE 6
BASIS OF FEDERAL JURISDICTION IN DISTRICT COURT 8
ARGUMENT 9
CONCLUSION 12
APPENDIX 13

CONTENTS OF APPENDIX

Extract of Transcript, September 29th, 1987 .... A - 1
Order of District Court, September 29th, 1987 .. A - 8
Judgment Order, Ct. of Appeals, May 19, 1988 ... A - 9
Denial of Rehearing, July 1st, 1988 ..... 1 - 10

AUTHORITIES CITED:

CONSTITUTIONAL PROVISIONS

Article IV, section 2 6
Amendment, Article V 6

STATUTES

Title 28 USC sect. 1331 ..... 6, 8
Title 28 USC sect. 1343 8
Title 66 Pa. C.S.A. sect. 1501 8

CASES

Anderson v Liberty Lobby, 472 US ____, (1986) 10
Anderson National Bank v Luckett, 321 US 233, .. 11
Bell v Hood 327 US 678, (1946) 10
Boddie v Connecticut, 401 US 371 (1971) 10
Carter v Stanton, 405 US 669 (1972) 11
Conley v Gibson, 355 US 41 (1957) 11
F.T.C. v Flotill Products, Inc., 389 US 179 (1967) .. 12
Hughes v Rowe, 449 US 5 (1980) 9
Pickel v U. S., 746 F2d 176 (3rd Circ.) (1984) 12

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS RENDERED BELOW

There were no official reports of opinions below in either the District Court or the Court of Appeals. The District Court referred to "the reasons set forth in the record of this case" in support of its Order of Dismissal with Prejudice (see A - 8).

The District Court deliberations following its announcement of the Dismissal with Prejudice are set out in the Appendix (page A - 1 to A - 7, September 24th, 1987 transcript).

A CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The Order of the United States District Court for the Western District of Pennsylvania (A - 8) was entered September 29th, 1987 and entered in the record the same day. The Third Circuit Court of Appeals confirmed the foregoing May 19th, 1988, and entered in the record the same day (A - 9).

Re-hearing denied in Court of Appeals. Order issued July 1st, 1988, (A - 10).

The statutory provision conferring jurisdiction to review by writ of Certiorari is Title 28 USC section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTE

Article IV, Section 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment Article (V): "nor shall any person . . . be deprived of life, liberty, or property without due process of law."

Title 28 USC section 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

A CONCISE STATEMENT OF THE CASE

The complaint was filed November 4th, 1985. Service on all defendants was promptly made by mail but only the Attorney General responded for the record. Personal service was promptly instituted to enlist the Gas Company and its employee. Their representative entered appearance on December 30th, 1985.

A Judge did not appear in the case until October 29th, 1986 (nearly a year after complaint filed). Meantime, motions were filed by both sides including a Show Cause why Default Should Not be Entered by Plaintiff

and Motions to Dismiss by Defendants. No hearing was ever set on any Motion made by any party.

The first Court session was a status conference on November 21st, 1986. At that time, his Honor announced settlement in Order. Three such conferences followed. Plaintiff was in regular attendance at all times.

At the last conference (September 24th, 1987), plaintiff had a lawyer present to assist him with settlement. The Judge insisted that the lawyer enter his appearance as the Attorney of Record. Plaintiff had only made arrangements for that one conference. This seemed to upset his Honor somewhat and an abrupt Dismissal with Prejudice was entered. The Appendix (A - 1 to A - 7) reproduces that portion of the conference (Court Reporter transcript) of September 24th, 1987, relating to what the Court said about its reasons for issuing the Dismissal with Prejudice. Plaintiff had no prior notice that such a judgment would be handed down. There are no other findings available relating to this Order (see A - 8).

The plaintiff seeks damages for constitutional violations arising from conspiracy between the Gas Company and the Pennsylvania Utility Commission whereby they promote the unlawful practice of the Gas Company in manipulating its customers through its Customer Service Department. Each customer is charged $7.59 per month for maintaining this Department and it owes a duty to protecting the customer's interest. Instead, the Customer Service Representative

sees to it that gas meters are moved at the Customer's expense if there is a leak shown on the customers service line when the meter needs changing. To accomplish this, the Customer Service representative misrepresents the company's position to the customer. The utility commission backs the gas company. With this attitude, the Gas Company gets many meters relocated at the customer's expense. The law requires the Gas Company to pay for such meter relocations. (Title 66 PA C.S.A. 1501)

Beginning with the first meeting with the Judge, plaintiff advised he was ready for trial. The plaintiff filed with the Judge a transcript of the proceedings before the Utility Commission which substantiated the plaintiff's complaint and was in lieu of depositions. The Judge has refused to enter this transcript in the record. Plaintiff filed separately in the Court of Appeals to have the State transcript entered by the Judge (3rd Circ. Ct. of Appeals, 88-5116) and has written his Honor to request its filing but has been unsuccessful to this date.

BASIS FEDERAL JURISDICTION IN FEDERAL DISTRICT COURT

The statutes cited in the Complaint for jurisdiction of the District Court were Title 28 USCS sect. 1331 and Title 28 USCS sect. 1343.

ARGUMENT

The Writ should be allowed. As a procedural matter, the judgment of Dismissal with Prejudice was not properly approached. It came up suddenly and unexpectedly. None of the parties was prepared for it. For a complete text of the conference proceeding related to the Judge's reasons for Dismissal with Prejudice, Appendix beginning page A-1.

On appeal, the plaintiff argued as set out in this petition. The two attorneys - each representing different elements of defendants - confined their briefs to re-argument of the Motions to Dismiss that they had filed approximately three years previously in lieu of an Answer to the complaint. These attorneys obviously were under the impression that the District Court Judge had picked one of the points in their Motion to Dismiss and used it as the basis for the Dismissal with Prejudice.

No oral argument was allowed in the Court of Appeals. Judgment was on briefs alone. Only the short judgment order reproduced at page A - 9 of Appendix was issued.

"As the Court noted in Christiansburg, even if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit. 434 US at 422, 54 L Ed2d 648, 98 S.Ct. 694" Hughes v Rowe 449 US 5, 15; 66 L. Ed2d 163, 173 (1980).

"--- it is clear enough from our recent cases that at the summary judgment stage the judge's function is not

himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v Liberty Lobby, Inc. 472 US -----; 91 L. Ed2d 202, 212, 1068 S. Ct. ------ (1986).

A case within the jurisdiction of a Federal district court under 28 USC sect 41 (now USC sect 1331) to try suits of a civil nature arising under the constitution or laws of the United States, is stated by a complaint seeking recovery of damages from Federal officers who violated their constitutional rights even though the Constitution and laws of the United States do not provide for recovery of money damages for such violations. Bell v Hood, 327 US 678, 90 L. Ed 939 (1946).

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. --- What the Constitution does require is 'an opportunity --- granted at a meaningful time and in a meaningful manner,' (case cited) 'for a hearing appropriate to the nature of the case,' Mullane v Central Hanover Tr. Co., 339 US 306, 313, 94 L. ed 865, 873, (1950). The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest ---" Boddie v Connecticut, 401 US 371, 378, 379; 28 L.Ed2d 113, 91 S Ct 780 (1971).

"A complaint should not be dismissed --- unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v Gibson, 355 U. S. 41, 45-46; 78 S.Ct. 99, 102, 2 L. Ed.2d 80 (1957).

"The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Anderson National Bank v Luckett, 321 US 233, 246, 88 L Ed 692, 705, 64 S. Ct 599, 151 ALR 824.

When an Order is "opaque and unilluminating as to either the relevant facts or the law with respect to appellants' claim," and relates to the summary dismissal of a complaint, the Order should be vacated and the case remanded to the issuing court for further proceedings. Carter v Stanton, 405 US 669, 671, 672; 31 L.Ed2d 569, 572 (1972).

Was the District Court's action the imposition of a sanction? Assuming it was, should not a lesser sanction and its possible effectiveness have been considered? There is no Circuit known to plaintiff that does not take the position that "Dismissal with prejudice is the harshest of sanctions and should be imposed only after considering lesser sanctions." Violation of this rule is an abuse of discretion and subjects the case to remand in any Circuit as far as can be determined.

The rule in the Third Circuit goes even further: "But the law of this circuit is that Rule 41 (b) dismissal should

be reserved for cases where there is a clear record of delay or contumacious conduct by the plaintiff. Furthermore, it is necessary for the district court to consider whether lesser sanctions would better serve the ends of justice. (case cited)" Pickel v U. S. 746 F2d 176, 182 (1984): Third Circuit.

Conflict with decisions of other Courts of Appeals will compel the Supreme Court to grant certiorari for review of a decision of a Court of Appeals. F.T.C. v Flotill Products, Inc., 88 S. Ct 401, 389 US 179, 19L Ed2d 398 (1967).

CONCLUSION

The case should be remanded to the District Court for the Western District of Pennsylvania for further proceedings incorporating notice, hearing and findings in connection with the Court's judgment of Dismissal with Prejudice including consideration of a lesser sanction, and its possible effectiveness, if a sanction is the purpose of the Court's action after further deliberative consideration.

CONTENTS OF APPENDIX

Transcript - in part - of conference held September 24th, 1987, before Honorable Paul A. Simmons, District Judge A-1

Order dated September 29th, 1987 (District Court, W.D., Pa.) A-8

Judgment Order, Third Circuit Court of Appeals, May 19, 1988 ..... A-9

Denial of Rehearing, July 1st, 1988, Third Circuit - Appeals A-10

PROCEEDINGS

Transcript (in part) of conference commencing on Thursday, September 24th, 1987, United States District Court, Pittsburgh, Pa., before Honorable Paul A. Simmons, District Judge.

Reproduction begins at line 7 on 4th page of transcript for that conference and continues without deletion through page 9. There were 11½ pages of transcript for that meeting.

The reproduced portions include everything the Court said in explaining the basis of the Dismissal with Prejudice.

TRANSCRIPT

THE COURT: --- The evidence is clear. The Defendant gas company has said they are not going to make you spend any money out of your pocket. They have said so on the record through their attorney. There is no damages at all that are possible in a lot of your averments in Paragraph 2 because there is no expense going to be on you to do anything, other than to allow your house to be open so they can change and replace the meter in order to safely bring gas onto your premises.

Now, that is clear. Now, in light of the Court's knowledge and conclusion that there is a Public Utility Commission, you have a remedy at law, plus the fact there's absolutely no damages here at all, that this --

that can possibly be claimed by you, Mr. Richardson, the Court is hereby and for the reasons herein stated on the record, we're dismissing your case at this time, with prejudice, because you have suffered no damage and the gas company has assured me that you will not in the future suffer any damage.

They have not moved your meter; you admit that. Your meter is still in the same place it was when you started this lawsuit. You do not have to put any service lines in at your expense. You do not have to make any alterations in your service line. And as a result of the fact that everything that you have stated in your averment here is not true because you have suffered no expenses, you have suffered no damages; and if you have suffered damages and expense, you have a remedy with the Public Utility Commission; and you can appeal their decisions to the proper appellate court, probably the Commonwealth Court; and you have a remedy, and this Court will abstain under those circumstances from exercising its jurisdiction.

So, the Court will put this in writing. We're going to dismiss your complaint. Let the record show that this Court has gone out of its way to give you an opportunity to have a lawyer. You do have a lawyer here, but he will not, for reasons known to himself and yourself, enter his appearance.

Mr. Bertani, Dante Bertani, a duly licensed lawyer, is here in the courtroom. He will not or has not, even

though requested by the Court, he has not entered his appearance in this case; and the Court feels that we have gone out of our way in -- this is the third or fourth session -- to try to be courteous and proper and to give your case every possible consideration; but there's no damage here.

The gas company has stated on the record that they will not change your meter as far as location of service lines are concerned. They will merely replace the meter because of obsolescence, at no expense to you, Mr. Richardson. So your case is dismissed, and that's the end of it.

MR. RICHARDSON: May I respond to that for the record?

THE COURT: Just a second. You have the right to appeal to the Court of Appeals if you wish.

MR. RICHARDSON: I'm going to appeal, yes.

THE COURT: You may do this. But the Court is going to abstain for the reasons I've said. You have a remedy at law in the state courts, administrative remedies; and secondly, you have suffered no damages; and thirdly, the gas company on the record has indicated to me that there is no expense on you or proposed expense that would cause you to have to spend any of your money in any way, shape or form in this case. And there's no inconvenience at all other than the fact that

you have to open your doors to allow them to change obsolete meters.

You have to do that every 15 years; is that correct, Mr. Brooks?

MR. BROOKS: Well, every 12 to 20 years, depending on the type of meter.

THE COURT: At least every 12 years you've got to change the meter.

MR. RICHARDSON: I'm never refused to open my doors to the gas company.

THE COURT: That's all they want to do, is change the meter. There will be no expense to you whatsoever.

MR. BROOKS: Your Honor, if I might point out something. In the course of changing the meter, they will test the lines, all the lines leading to the meter. In the event there is a leak on Mr. Richardson's private house line, that is his property, repairing that leak would be --

THE COURT: That's in accordance with Public Utility Commission rules.

MR. BROOKS: That's correct; that's not as a result of the meter change.

THE COURT: That's because of the fact for safety, they, the gas company, has to make sure to protect your life and your family's life, Mr. Richardson, from damages. They have to test the lines, which is only common sense.

So you haven't suffered one whit of damage. You will not suffer any damage in the future, other than potential damages which are required by the fact that you've got to change this meter every 12 years or so because of potential obsolescence or wearing out of the meter.

MR. RICHARDSON: I've never refused to let them to come in to do anything they have to do.

THE COURT: So there's no problem.

MR. RICHARDSON: They don't have to lie; they don't have to cheat in court.

THE COURT: I don't know anything about that. All I'm telling you --

MR. RICHARDSON: I'm telling you, Your Honor.

THE COURT: There is no discernible damage. I have concluded this. I can't possibly, after reading all of the complaints, after hearing all of the -- your position and the gas company's position, and the gas company's statement, there's absolutely no damage that you've

suffered here that's cognizable in this court. And besides, you have a remedy with the Public Utility Commission, and the Court should abstain under those circumstances until you have exhausted any remedies that are given to you under the state law under the circumstances; so we're dismissing this case, and we'll have a written order to that effect, dismissing your claim for reasons stated on the record.

We will have this record transcribed, and that's the end of this case.

MR. RICHARDSON: I want to add one question, Your Honor. I have not been given -- I don't mean to make you angry or anything like that.

THE COURT: No, no; you're not making me angry.

MR. RICHARDSON: They might be completely sincere, I don't know. I've not been given fair treatment. I have not been given fair treatment.

THE COURT: I don't know what more treatment you want. Nobody's hurting you.

MR. RICHARDSON: I want exemplary damages. These people -- an example should be made of these people for what they've done.

THE COURT: What did they do to you? Nothing.

MR. RICHARDSON: They lied in court.

THE COURT: Your meter is still where it always was; they didn't take it out, didn't make you change.

MR. RICHARDSON: The meter is just a by-product of this thing. This is what prompted them to go -- to take me to court, to force me into court; and then to come down there and then -- and under oath say that they wrote me a letter that had a lie -- had lies in it; they had never been to my house at all again that night.

THE COURT: That's neither here nor there.

MR. RICHARDSON: I don't have a jury --

THE COURT: The point is you don't have to make any alterations to your line, as you allege; that the meter is not going to be changed. It's not going to be put outside, so you have no damage as far as this Court is concerned.

MR. RICHARDSON: I demand the right to amend - to have my attorney amend the matter.

THE COURT: The case is dismissed, and you have ---.

End of Transcript

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Usual Heading For Civil Action No. 85-2641)

ORDER OF COURT

AND NOW, this 29th day of September, 1987, after consideration of the record and the contentions of the parties, and for the reasons set forth in the record of this case,

IT IS HEREBY ORDERED that Plaintiff's case is DISMISSED WITH PREJUDICE.

PAUL A. SIMMONS
UNITED STATES DISTRICT
JUDGE

cc: Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3697

(Usual Heading)

(Civil No. 85-2641 - W.D. Pa. - Pittsburgh)
DISTRICT JUDGE: Honorable Paul A. Simmons

Submitted Under Third Circuit Rule 12(6)
April 27, 1988

PRESENT: SEITZ, COWEN and GARTH, Circuit Judges.

JUDGMENT ORDER

After consideration of the contention raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

ORDERED appellees are granted attorneys' fees of $150 because of the frivolous nature of the appeal.

Costs taxed against appellant.

By the Court:

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

DATED: MAY 19, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3697

(Usual Heading)

Appeal from the United States District Court
for the Western District of Pennsylvania
(Civil Action No. 85-2641)

SUR PETITION FOR REHEARING

Present: GIBBONS, **Chief Judge,** SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and GARTH, **Circuit Judges.**

The petition for rehearing filed by appellant, William B. Richardson, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

DATED: JULY 1, 1988